

Central Law Journal.

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The courts seem to be as far apart as ever upon the proposition whether an action will lie for malicious interference by a stranger with the performance of a contract. The Supreme Court of California, has lately held, in *Boyson v. Thorn*, that suit for damages cannot be maintained against one who maliciously, but without threats, violence, fraud, falsehood or benefit to himself, procures a breach of contract between others. The English cases of *Lumley v. Gye* and *Bowen v. Hall*, wherein the contrary doctrine was originally laid down, were repudiated by the California court and the reasoning of Lord Coleridge, who dissented in those cases, was approved. The cases of *Walker v. Cronin* (Mass.), *Jones v. Stanley* (N. C.), and *Haskins v. Royster* (N. C.), which followed the English ruling, were repudiated or explained satisfactorily to the court and the Kentucky cases—*Boulier v. Macauley* and *Chambers v. Baldwin*, where such right of action was denied, were cited approvingly. The case of *Chesley v. King* (Me.), in which the English doctrine was asserted, was not noticed or at least not referred to. The argument of the court was substantially that of Sir John Coleridge and Lord Coleridge, who ingeniously combated the views of Lord Campbell, Lord Justice Brett, Lord Selborne, and Mr. Justices Crompton and Earl, in the cases of *Lumley v. Gye* and *Bowen v. Hall*. The reader will find an extended review of all these cases in 32 Cent. L. J. 275, in the shape of a note to the Kentucky case of *Chambers v. Baldwin*. On the other hand, the English doctrine has lately been affirmed by the English Court of Appeal in *Temperton v. Russell*, wherein it was held that it was actionable for the defendants, a joint committee of several trade unions, maliciously to induce persons to break contracts with the plaintiff, an employer who had refused to accede to the demands of the unions. It was also held actionable for such defendants maliciously to combine to induce persons not to enter into new contracts with such

plaintiffs. The first point decided is plainly sustained by the doctrine of *Lumley v. Gye* and *Bowen v. Hall*. The second point presents more difficulty, though it seems to be a necessary sequence of those cases. At the same time the view of the court that if one person had induced others not to contract with plaintiff there might have been no right of action, and that the merit of the action was in the "combination" of persons, seems illogical and unreasonable.

The effort of the California court and other courts, taking a similar position, to distinguish between cases of master and servant and those of ordinary contract, does not seem to us to be satisfactory. As we remarked at the time of the decision of the Kentucky case (32 Cent. L. J. 265), the English doctrine commends itself as the sounder, upon the ground, divested of all subtlety, that every wrongful act which produces actual injury to another, such injury being its natural and probable consequence, is actionable.

The *Albany Law Journal* reports a curious postal case. It seems that late in December, 1881, a man in Washington wrote a postal card to a London bookseller, asking the latter to send him a large consignment of rare books. For twelve years the Washingtonian received no answer. He assumed that the bookseller had been unable to fill his order, and let the matter drop. But the other day, to his amazement and inconvenience, the books arrived. He immediately charged the dealer with neglect. The latter responded that he had acted as quickly as possible, that it took a few months to collect the books, and then, for the first time, the date on the postal card was examined. The dealer had received it in May, 1892—more than ten years after it was mailed. The American held that the Englishman was responsible for not having noticed the date, and the latter replied that even if he had noticed it, he would have been justified in considering it a slip of the pen which made 1891 read 1881. "Meanwhile," the *Albany* says, "the question arises where was the postal card during all those years? The bookseller and his customer are still wrangling and the post-office authorities are trying to solve the problem of the strange delay."

NOTES OF RECENT DECISIONS.

PRINCIPAL AND SURETY—PROMISE FOR THE BENEFIT OF A THIRD PERSON.—In *Jefferson v. Asch*, decided by the Supreme Court of Minnesota, it was held that a stranger to a contract between others in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger and no duty or obligation to him on the part of the promisee, cannot recover upon it. On the legal question involved the court said:

In *Lawrence v. Fox*, 20 N. Y. 268, the most conspicuous and most thoroughly reasoned case in New York, sustaining an action by a stranger to a contract—the promisee owed the debt which the promisor agreed to pay, and loaned him money, which he agreed to pay to the promisee's creditor. *Thorp v. Coal Co.*, 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whiteley*, 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. The chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to-wit, that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes*, 12 N. Y. 74, and approved in *Garnsey v. Rogers*, 47 N. Y. 233. In *Vrooman v. Turner*, 69 N. Y. 280, similar in its facts to the case in 10 Paige, the court go over the whole ground, recognize the decision in *Lawrence v. Fox*, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party who may derive a benefit from the performance of the promise an action there must be—first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two,—the promisee and the party to be benefited, and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement;" and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." In some cases, near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place

of a strictly legal right in the third party (*Dutton v. Pool*, 1 Vent. 318; *Felton v. Dickinson*, 10 Mass. 287), are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor any thing such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vrooman v. Turner* settled the law in New York, as the decision, though subsequently referred to with approval (see *Wilbur v. Warren*, 104 N. Y. 193, 10 N. E. Rep. 263; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. Rep. 58; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. Rep. 135; *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. Rep. 917; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49), has never since been questioned. The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by Metcalf, J., in *Mellen v. Whipple*, 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to classify the cases in that State in which one not a party to the promise has been permitted to sue upon it. The classification may be briefly stated as—First, cases where the defendant has in his hands money which in equity and good conscience belongs to the plaintiff—as, if A put money or property in the hands of B as a fund from which A's creditors are to be paid, and B has promised expressly or impliedly to pay such creditors; second, cases where a near relationship, as father and child, or uncle and nephew, exists between the promisee and the person to be benefited; third, cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired. We have referred so fully to the decisions in New York and Massachusetts because in those States the question has more frequently arisen, and been more ably and thoroughly discussed than elsewhere in this country. There has been no decision of this court at variance with the rule as held in those two States. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in the *Vrooman* and *Mellen* cases. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown v. Stillman*, 43 Minn. 126, 45 N. W. Rep. 2. Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it. Such is this case.

NEGLIGENCE—INDEPENDENT CONTRACTOR—MUNICIPAL CORPORATION.—In *Colegrove v. Smith*, 33 Pac. Rep. 115, it is held by the Supreme Court of California, that where a person obtains from a city, by ordinance, license to lay pipes along its streets, he will be liable for injuries resulting from the negligent

manner in which such work is done, even though the work is not done by himself, but by an independent contractor employed by him for that purpose. The court says:

It is commonly said—and, in a large class of cases, correctly—that the principle of *respondeat superior* does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employee, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see *Boswell v. Laird*, 8 Cal. 469. But there are exceptions to the general doctrine, and this case, I think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not by such contract have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street, and lay their pipes, relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created, and, if not done in the manner required by the ordinance, the departure creates a nuisance. It is very different from the erection of a building, or the doing of other work upon private property, which does not constitute a nuisance, and which causes no danger to the public unless negligently performed. The owner, in such case, is under no contract relation to the public. He owes a duty, however,—that of care to prevent accidents; but when he selects a competent workman, and intrusts the whole work to him, he discharges that duty. But if I am under a duty to another, created by contract or by statute, it is obvious that I cannot relieve myself of any of its obligations by contracting with another to do the same work; or, if a work which I may lawfully do creates a danger to others, I cannot escape liability by contracting with another to do it; for by contracting with another I authorize him to create the danger. But where the work is unattended with danger, except from negligence, a contract to do the work excludes negligence, and the contractor is liable. Attention is not called by counsel to any case in this court where the question here presented appears to have been considered, but authorities elsewhere are abundant, and quite generally uniform in support of the views above expressed. In *Gray v. Pullen*, Best & S. 970, A was empowered, under the metropolis local management act (18 & 19 Vict.), to make a drain from his premises to a sewer by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. Held that A was responsible in an action by B. In *Bower v. Peate*, 1 Q. B. Div. 321, 326, Cockburn, C. J., said: "A man who orders a work to be executed,

from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventive measures are adopted." In *Pickard v. Smith*, 10 C. B. (N. S.) 470, the defendant, having employed a coal merchant to put coal into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. In this case, after referring to the general rule placing the liability upon an independent contractor, the court said: "That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned."

Appellants contend that in this State municipal corporations are not liable for injuries resulting from imperfections in the streets, and upon this ground attempt to distinguish this case from a large number of cases where the city was primarily liable, and also from other cases where the person or corporation which had obtained permission to do the work had agreed with the city to be answerable for all damages that might be sustained. Whether or not the City of Pomona was liable for the injury to respondent is immaterial. The contractors, O'Neil and Osler, were undoubtedly liable, and, if so, appellants would have been liable, had they done the work themselves; and the question here is whether they did or could relieve themselves from responsibility by letting the work to independent contractors. Nor does the fact that there was not an express contract between appellants and the city to answer all damages at all affect the question, since the implied obligation arising from the franchise and the character of the work imposed upon them a liability for injuries caused by their negligence, in every respect as conclusive as an express contract. *Chicago City v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657, and *Water Co. v. Ware*, 16 Wall. 566, all sustain the view we have taken. *Woodman v. Railroad Co.*, 149 Mass. 335, 21 N. E. Rep. 432, and *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. Rep. 421, on appellants' brief, are directly against them. The first of these cases was that of a street railway corporation which employed a contractor to lay a new track in a city street, and through whose negligence in not properly guarding the work the injury happened. The railway company was held liable. The court said: "If the performance of a lawful contract necessarily will bring wrongful consequences to pass, unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs." In the American cases above referred to will be found cases cited from many of the States sustaining the same doctrine. Appellants,

however, seem to rely principally upon the case of *Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. Rep. 227, and *Railroad Co. v. McConnell*, 87 Ga. 756, 13 S. E. Rep. 828. In the first of these cases the court recognizes and enumerates the exceptions to *respondet superior*, but includes that the facts do not bring it within any of the exceptions. The correctness of its conclusion in that case may well be doubted, though whether correct or not need not be considered here, since the case at bar comes clearly within the second exception to the general rule there stated, and to which the learned justice cites *Bower v. Peate*, and *Pickard v. Smith*, *supra*. The broad distinction between that case and the case at bar is apparent, since the trenches could not be dug in the streets of Pomona without danger to those having occasion to use the street, while a railroad embankment could be constructed without danger of creating a nuisance by impounding water which by stagnation produced malaria, and thereby became a nuisance. The second case (*Railroad Co. v. McConnell*) supports appellant's contention, but the court clearly came to a wrong conclusion. But three cases are cited in support of the conclusions reached by the court. One of these (*Overton v. Freeman*, 11 C. B. 867) was a "common pleas" decision made in 1852, and which is in direct conflict with *Gray v. Pullen*, 5 Best & S. 970 (decided in 1864, in exchequer chamber, on appeal from queen's bench, and upon the appeal *Overton v. Freeman* was not only cited in the argument, but quoted from, and, though it is not referred to in the opinion, it was clearly overruled. Another of the cases there cited is *Hackett v. Telegraph Co.*, 80 Wis. 187, 9 N. W. Rep. 822. There the defendant contracted with a railroad company to erect for it a line of telegraph. A hole was left unguarded over night, into which a child fell, and was injured. A clear distinction between that case and the one at bar is stated by the court as follows: "The railroad company was not required, by its contract, to dig any hole in a traveled public street;" while here the work was required to be done in a public street in a city, and the negligence was in doing improperly that which the contract required to be done, and not in some matter collateral to, and not required to be done in the performance of, the contract. The other case referred to in the case of *Railroad Co. v. McConnell* is that of *Railroad Co. v. Kimberly*, above noticed.

LEASE — RIGHT TO ICE. — The Supreme Court of Iowa decide, in *Marsh v. McNider*, that a lease of a tract of land including half the bed of a stream gives the lessee whatever rights the lessor has to cut and remove the ice. The court, *per Robinson, C. J.*, says:

It is well settled that, under some conditions, water and ice are to be regarded as real estate, belonging to the owner of the land which is beneath it. See *State v. Pottmeyer*, 33 Ind. 402, and cases therein cited; 9 Amer. & Eng. Enc. Law, 853. And, when that is the case, the land-owner or his assign has the exclusive right to gather and dispose of the ice for his own benefit, subject to the rights of other riparian owners. See *Bigelow v. Shaw*, 65 Mich. 341, 32 N. W. Rep. 800, and cases therein cited. In this State the owner of land has the right to use so much of the water of a stream flowing over it as is necessary to supply what are termed his "natural wants." *Spencer v. McDonough*, 77 Iowa, 461, 42 N. W. Rep. 371; *Ferguson v.*

Manufacturing Co., 77 Iowa, 576, 42 N. W. Rep. 448. Where he does not own the soil under the stream, as where it is meandered, and his ownership does not include its bed, he has no exclusive right to the ice which forms in it. *Serrin v. Grefe*, 67 Iowa, 197, 25 N. W. Rep. 227. In such cases, whoever has lawful access to the stream may use the water and the ice which forms therein in such manner as does not interfere with the rights of the riparian owners. *Brown v. Cunningham*, 82 Iowa, 515, 48 N. W. Rep. 1042. Whether the ice which forms in a running stream is to be regarded technically as a part of the land over which it is formed or to which it is attached is a question we do not find it necessary to determine. It is water congealed, and, although more readily secured and controlled for many purposes than water, it is in most respects subject to the rules which govern the rights of the riparian proprietor to the water. Ice may be attached to his land, but it was not produced by the land, drew nothing from it, and will give nothing to it. It is transient by nature, and will soon disappear, unless prevented by the labor of man. It is a product of the changing seasons, which the occupier of the soil may use as he might have used the water from which it was formed. If he own the land under it, he may use the ice as he might have used the water, to supply his natural wants, and for other purposes, so far as he can do so without affecting the rights of others, as of lower owners on the same stream. Such use appertains to the land, and belongs to him who has the right to possess and use it. In this case that right was conferred upon Fulghum, by virtue of the lease. It is said that his lease was for ordinary farming purposes only, but, if that were true, he would have had the right to use so much of the water and ice as he required for such purposes. The lease, however, does not restrict the tenant to the use of the premises for agricultural purposes only, but gives him the right to the "free and uninterrupted occupation thereof," and necessarily the right to use them and their appurtenances. Nothing was reserved, excepting timber not required for repairing fences. The leased premises included one-half of the bed of the stream, and such rights as the owner had in the stream itself. He retained no right to enter upon the premises to gather ice, and his grantee acquired none as against the tenant. We are of the opinion that the lease gave to the tenant the right to cut and remove the ice in question, and find that such right was assigned to the defendants.

CRIMINAL LAW—JUSTIFIABLE HOMICIDE—ROBBERY.—One point in the case of *Crawford v. State*, 17 S. E. Rep. 628, decided by the Supreme Court of Georgia, is of special interest, involving the question as to how far homicide to prevent a robbery is justifiable. The holding of the court is that if a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable if necessary in order to prevent it; but a trespass which amounts only to a misdemeanor will not justify the killing. Where, therefore, a person stopped in the highway the wagon which another was driving, and took from it certain meat of the

other, for the declared purpose of settling a debt which he claimed was due him by the owner, and while proceeding with his pocket-knife to cut off enough of the meat to pay the debt, the owner sought to prevent him, and the trespasser cut at him with his knife to prevent interference, and the owner thereupon seized a fence rail—a deadly weapon—and without necessity struck the trespasser on the head, thereby causing death, the homicide was not justifiable if the claim of debt was made in good faith, and there was no intent to steal, but was manslaughter. If the blow was to prevent robbery, and was necessary for that purpose, the homicide was justifiable. Simmons, J., says:

In charging upon the right to kill in defending against a robbery the court instructed the jury that this right would not exist after the possession of the property had passed from the owner to the person taking. This instruction, under the evidence in this case, was improper; because no such change of possession as had taken place would cut off the right of the defendant to protect his property against a felonious taking, the property being still in his immediate presence, and the deceased being then engaged in severing that part of the meat which he had said it was his intention to take, and in resisting with his knife the efforts of the defendant to prevent him from carrying out this intention. The taking was not a past, but a present and progressing, injury; and if the defendant acted under a reasonable belief that the purpose of the taking was robbery he had the right to arrest it in the manner he did, although there may have been already such a change of possession as would in law amount to a robbery. The right of the owner of property to defend it against a felonious taking, to the extent, if necessary, of killing the person taking, does not end at the moment the guilt of that person is technically complete. It extends not merely to the prevention of such asportation as may be sufficient to render the person taking guilty of robbery, and which may be effected by the slightest change of possession, but to the prevention of his carrying off the property which he has thus gotten from the owner. The object of the law being to allow the owner to protect his property against the robber, it would be unreasonable to hold that at the moment such asportation is accomplished, and before the robber has gotten away with the article taken, the right of the owner to defend his property is at end; and that, where the moment before he could lawfully kill in defense of it, he must yield if the slightest change of possession has been effected, and if he then killed the robber to prevent the article from being carried off, would be guilty of murder. The effect of the instruction as to change of possession was to exclude the defense that the killing was done to prevent a robbery; and although, as we have said, the evidence to sustain this theory is slight, the jury were authorized to adopt it, and it might have been proper to do so, had it not been for the charge referred to. If, however, the evidence does not sustain this theory, we think it tends rather to make out a case of manslaughter than of murder, though we do not go to the length of upholding the position taken by

counsel for the accused, that a homicide to prevent a mere trespass, not amounting to a felony, is manslaughter only. That view finds no sanction in any adjudication of this court, nor in the authorities generally; at least, where, as in this case, the trespass is upon property of trifling value, not at the habitation. In *Hayes v. State*, 58 Ga. 46, it is said that "to intentionally kill with a deadly weapon one who is committing a trespass upon property is generally murder, and not manslaughter," and that no exception to this general rule is involved where the trespass is "the appropriation and removal of a small piece of timber of trifling value." And it is explained that what is said in *Monroe's Case*, 5 Ga. 86, relied upon by counsel here, and in the *Keener Case*, 18 Ga. 194, to the effect that a trespass amounting to a misdemeanor will reduce the killing to manslaughter, "refers to trespass affecting the person, and not to trespass affecting the goods only." See, also, *Whart. Hom.* § 414; *Kerr, Hom.* §§ 12, 13, 149, 185; 9 *Amer. & Eng. Enc. Law*, 586. But while a trespass of this kind does not justify a killing, and is not of itself sufficient to reduce the homicide to manslaughter, yet if the circumstances show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass, and acted upon before the passion had time to cool, we think the trespass would amount to such a reasonable provocation as in law would justify the excitement of passion, and thus operate to reduce the offense to manslaughter. Certainly this would be so if, as in this case, the trespass was accompanied with assaults against the person of the owner with a knife, in resistance to his efforts to prevent the trespasser from carrying away his property. Some of the authorities, it is true, "appear to lay down the doctrine that, though the passions become excited in the mere defense of property other than the dwelling house, a killing with a deadly weapon used in such defense, or other like dangerous means, is murder;" but this doctrine, says Mr. Bishop (2 *Crim. Law* [7th Ed.] § 706, note), "though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination; for surely, although a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not precisely on the same foundation, yet, since he has the right to defend his property by all means short of such as produce death, if, in the heat of passion arising during a lawful defense, he seizes a deadly weapon, and with it unfortunately takes the aggressor's life, every principle which in other cases dictates the reduction of the crime to the mitigated form requires the same in this case." See, also, 9 *Amer. & Eng. Enc. Law*, 586, 587; 1 *Whart. Crim. Law* (9th Ed.), § 462. The kinds of provocation which our Code, in defining what shall constitute voluntary manslaughter, declares insufficient to reduce the homicide to that grade, are "words, threats, menaces, or contemptuous gestures," (section 4325); but it does not exclude from among the reasonable grounds of provocation a trespass upon property, accompanied with such hostile demonstration against the person of the owner as were shown to have taken place in this case. The test laid down by this section by which to determine whether the offense shall be reduced to manslaughter is that "the killing must be the result of that sudden, violent impulse of passion supposed to be irresistible," and that "there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the ex-

citement of passion, and to exclude all ideas of deliberation or malice, either express or implied." In the present case we think the circumstances conform to this test. We think they may properly be classed among those circumstances which justify the excitement of passion, and exclude the idea of deliberation or malice. The deceased, as we have seen, was the aggressor, having provoked the first quarrel, and having afterwards followed up the defendant when the latter was seeking to get away from him, and renewed the difficulty by taking the defendant's meat, and proceeding, despite his remonstrances, to cut it up, with the avowed intention of carrying off a part of it, at the same time adding to the provocation by making repeated assaults against the defendant with a knife while he was seeking to get back his property; and this notwithstanding the money claimed to be due from the defendant had then and there been offered to the deceased. The use of a weapon by the defendant was evidently an afterthought, and was resorted to only after his repeated efforts to get back his property without such means had proved unavailing, and after he had wrought up by continued provocation.

CARRIERS OF PASSENGERS—WHO ARE PASSENGERS.—In *Atchison, T. & S. F. R. Co. v. Headland*, decided by the Supreme Court of Colorado, deceased asked a freight conductor on defendant's railroad to carry him free to a certain point, saying that he had formerly been a railroad man, and was a cripple. The conductor refused. After the train had proceeded some distance, however, the conductor found deceased in the caboose. There were also in the caboose several persons traveling with stock, as well as a fireman seeking employment, none of whom were provided with transportation, or paid fare. The conductor, not liking to put deceased off late at night in the open country, allowed him to ride. It was held, that deceased was not a passenger, within *Mills' Ann. St. § 1508*, furnishing a right of action for injuries to passengers in certain cases. *Hayt, C. J.*, said, *inter alia*:

The fact that the conductor, after discovering Shipman in the caboose, did not eject him, did not constitute the latter a passenger. The evidence shows that the conductor did not discover his presence until the train was well under way, and had proceeded a distance out of the city. The argument that it was the duty of the conductor, under the circumstances, to stop the train, and eject him from the car, cannot be given much weight, in view of the circumstances. The answer to this argument is found in the testimony of that officer, in answer to the following question: "Why did you not stop the train and put him off? Answer. I just didn't have the heart to do it. I didn't feel disposed to put off a cripple, in the middle of the night, out in the country." If the deceased had been a strong, able-bodied man, traveling in the daytime, it would perhaps have been the conductor's duty to have put him off at the first station, but if, from feelings of humanity, he allowed a cripple to remain on the car, rather than put him off at mid-

night, certainly the law will not from this forbearance raise the presumption that the deceased was entitled to all the rights of a passenger upon the defendant's train. The real question is as to whether the defendant should be held to have consented to receiving the deceased as a passenger upon its freight train. If the defendant had been in the habit of carrying passengers upon such trains, evidence of this fact should have been produced. To overcome the presumption against such a custom it is not sufficient that in the present instance there were upon the caboose others besides Shipman. With one exception, they were all men in charge of stock upon the train, and it may be customary for such persons to travel on the same train with stock and not for others to do so. As to the fireman, he was on the train at the demand of his brother fireman. In our opinion, the deceased is not shown to have been a passenger at the time of the accident.

A number of well considered cases will be found, supporting this conclusion. In the case of *Eaton v. Railroad Co.*, 57 N. Y. 382, the plaintiff got upon a coal train on the defendant's road, at the invitation of the conductor. To this train no passenger car was attached, but at the end of the train there was a caboose, in which plaintiff was invited to, and did, ride. Through the negligence of the company's employees the train was run into by another, and plaintiff injured. At the trial it was shown that by a regulation of the defendant, printed for the use of employees, passengers were forbidden to ride on coal trains, but of this regulation plaintiff had no actual notice. It did not appear that it was the custom to allow passengers to ride in the caboose. Under these circumstances the trial court instructed the jury that if plaintiff was upon the train with the assent of the conductor, and without being informed of the regulation, then defendant was liable. Upon appeal this instruction was held erroneous, and the liability of the company denied. It was said that there was nothing in the attendant circumstances indicating an apparent authority in the conductor to create between the parties the relation of passenger and carrier. It is further said in this case, in substance, that, while the conductor of a passenger train has ample authority to receive passengers upon his train, the conductor of a freight train has no such authority, and that in the case of a stranger riding upon a freight train the presumption would be indulged that he is not legally a passenger, and that to such a person the company was under no obligations to be careful.

An examination of the case cited as opposed to the conclusion that deceased was not a passenger shows that they are readily distinguishable from the present case. In *Dunn v. Railway Co.*, 58 Me. 187, the injured party, although riding in the caboose of a freight train contrary to the rules of the company, was treated by the conductor as a passenger, and first class fare collected from him. In *Cleveland v. Steamboat Co.*, 68 N. Y. 306, the plaintiff was injured before the boat upon which he was a passenger had left its wharf, and before he had an opportunity to pay fare; and the court held that the carrier owed him the duty of a carrier to passengers, although no fare had been paid. In *Jacobus v. Railway Co.*, 20 Minn. 125; *Gil. 110*, the plaintiff received a personal injury through the negligence of the defendant's servants in charge of a passenger train, upon which plaintiff was traveling on a free pass; and the court held that the same degree of care was required of defendant as if plaintiff had been a passenger for hire.

Here the company had undertaken to carry, and the duty arose from this fact. In *Railroad Co. v. Brooks*, 57 Pa. St. 339, the plaintiff was a route agent riding upon a passenger train, and the court held that every one upon the car was presumed to be lawfully there as a passenger, having paid, or being liable, when called upon, to pay, his fare, and that the *onus* is upon the carrier to prove affirmatively that he was a trespasser. The case has no similarity to the one under consideration. In *Creed v. Railroad Co.*, 86 Pa. St. 139, it was held that "where one is traveling by a passenger train, and is not connected with the railroad company, the legal presumption is that he is a passenger, and traveling for a consideration"—a conclusion which we do not dispute. As to the criticism of Judge Thompson upon the decision in *Eaton v. Railroad Co.*, to be found in his work on *Carriers of Passengers*, at page 344, it is to be observed that the criticism does not apply to the case before us. In that case the company was held not liable for an injury resulting from the gross negligence of its employees, although the injured party was invited to ride by the conductor. Here the deceased was refused passage by the conductor, and the recovery is based upon the claim that he was entitled to the care due a passenger. It not appearing that the deceased was a passenger upon the defendant's freight train, the plaintiff is not entitled to a recovery under the second subdivision of the statute, and the judgment must be reversed.

RIGHTS OF MEMBERS OF INSOLVENT MUTUAL BENEFIT SOCIETY.—In the case of *Fogg v. Supreme Lodge of Order of Golden Lion*, 33 N. E. Rep. 692, the Supreme Judicial Court of Massachusetts was called upon to distribute the assets of an insolvent mutual benefit society, and in so doing decided some interesting points of law. It was contended in behalf of certain certificate holders that the whole business prosecuted by the Order of the Golden Lion was illegal, and *ultra vires*, and that, therefore, all moneys collected by it from its apparent members were paid without consideration, and might be recovered back in actions for money had and received. But the court refused to follow this line of argument, holding that even if the business was illegal the money was voluntarily paid and therefore could not be recovered. This reasoning seems to agree with a recent decision of the Appellate Court of Illinois, not yet reported in regard to a similar organization, whose business was conducted in Chicago.

The court was also required to decide whether certificate holders had lost their right to prove claims against the reserve and benefit funds in the hands of the receiver by failing to pay assessments which were illegal by reason of irregularities of the officers in laying the same or otherwise. The principal grounds of ille-

gality which were suggested by counsel were these:

(1) That paid agents were employed to solicit or procure business, and that by reason thereof, under the Massachusetts statute, no assessment could legally be laid, and no business could legally be done; (2) that assessments were laid in violation of the provisions of statute that no assessment shall be made while there remains unexpended in the benefit fund an amount equal to one assessment. If holders of certificates, said the court, intended to rely upon considerations like these to enable them to maintain their standing in the order without paying the assessments, good faith towards the order, and towards other holders of certificates, who were paying their assessments without objection, required that a statement of the reasons for not paying the assessments should be promptly made; otherwise all persons concerned would go on under the belief that no such ground of objection was to be urged. It is not suggested that any holder of a certificate ever placed his failure to pay an assessment on these grounds, or made it known to the order that he should insist on his rights as a holder in good standing, in spite of his omission to pay the assessments. Therefore, this ground of claim is not now open. Any other construction would lead to hopeless confusion and difficulty.

The *National Corporation Reporter* says that "this decision seems to be based upon the plainest principles of justice, and is aimed at that large class of persons who desire to share in the profits of an enterprise while it is prosperous, and to escape their share of the loss when it falls into difficulties. The sooner all these people learn that they cannot blow hot and cold at the same time the better."

INSOLVENCY UNDER PENAL STATUTES — RECEIVING DEPOSITS BY INSOLVENT BANKS — CONSTRUCTION OF STATUTES.

Many of the States, especially in the west, have adopted statutes imposing penalties upon officers and directors of banks for receiving deposits into their banks when insolvent, with knowledge on the part of such offi-

cers or directors of such insolvency. It is only necessary to quote one such statute, that of Nebraska, as a sample, viz: sections 12 and 13 of chapter 8 of the Compiled Statutes for the year 1889. Section 12 is as follows: "No bank, corporation, firm or individual, engaged in the banking, broker, exchange or deposit business shall accept or receive on deposit with or without interest, any money, bank bills or notes, or United States treasury notes, or currency or other notes, bills or drafts, circulating as money or currency, when such bank or corporation, firm or individual is insolvent." Section 13, prescribes the penalty for a violation of the prohibitions of section 12. Iowa, Missouri and other western States have similar statutes. Statutes of this character are seemingly of comparatively recent date, for we find that very few cases under them have reached the appellate courts. The leading case construing such a statute, and the only one the writer has been able to find where the statute has been construed in a criminal prosecution, is *State v. Cadwell* (Ia.), 44 N. W. Rep. 700. In this case the court cites the decision in *Dodge v. Mastin*, 17 Fed. Rep. 660, arising under the statute of Missouri, and adopts the definition of insolvency there given. The latter was a civil action against Mastin to recover \$6,000 which was received on deposit in the Mastin bank, of which defendant was cashier, when it was known by him to be insolvent and in failing circumstances. The Missouri statute,¹ not only is penal, but it makes the officers liable for losses occurring under circumstances mentioned in the act. For reasons hereafter considered in this article the construction of the statute in this, a civil action, does not constitute a safe precedent to follow in a criminal case. The controlling question in the construction of these penal statutes, in criminal cases, is: What definition of "insolvency" shall be adopted, the general and popular one or the limited and restricted definition adopted in construing the bankruptcy acts? The Iowa court, in *State v. Cadwell*, adopted the latter; and it remains to be considered whether that court did not commit error in so doing. The court says: "It would be nearer in harmony with the spirit and purpose of the law to say that its design was that depositors should receive

their money in substantial accord with their understanding when deposited, and that a bank whose affairs are so situated that it cannot meet its demands in the usual course of business is, within the meaning of the law prohibiting the receipt of deposits, insolvent.

* * * Depositors with knowledge of such facts would not make deposits, and hence their receipt in silence as to the facts is a fraud. Does our statute contemplate less than to make such fraud a crime?" Is this sound construction? Should the court say in a criminal case that the legislature intended to require bank officers to return to depositors their money on demand, at the peril of becoming criminals. If so, then clearly the legislature has placed a severe and unnatural limitation upon the business of banking. A deposit of money in a bank is nothing more nor less than a loan to the bank.² Why should the above severe rule be applied to bank officers who borrow money and not be applied to any other borrower? Would it not be more in accord with natural justice to apply the more reasonable rule that the statute was intended to protect the depositors from ultimate loss? Should we not rather say that the legislature intended to use the word insolvency, in this penal statute, in its general and popular sense? For instance, solvency means: "Ability to pay at some future time, upon settlement of one's estate."³ Insolvency means: "Sometimes the insufficiency of the entire property and assets of an individual to pay his debts, the general and popular meaning. In a more restricted sense, inability to pay debts as they become due in the ordinary course of business."⁴ Again: "Insolvency is owing debts in excess of the value of one's tangible property. Without debts there can be no insolvency."⁵ "Insolvency; condition of being insolvent; want of means or of sufficiency of property for the discharge of all debts or obligations."⁶

² "In the case of a general deposit the depositor parts with the title to his money and loans it to the bank, and the latter, in consideration of the loan and right to use the money for its own profit, agrees to refund the same amount, or any part thereof on demand." 2 Am. & Eng. Encyc. of Law, p. 93.

³ Anderson's Dictionary, Solvency.

⁴ *Id.*, p. 552; *Toof v. Martin*, 13 Wall. 47.

⁵ Anderson's Dict., p. 553; *Bowerbox's Appeal*, 100 Pa. 438; *Daniels v. Palmer*, 35 Minn. 347, and cases cited.

⁶ *Century Dict.*; 5 L. R. A., note on page 765; *Curtis v. Leavitt*, 15 N. Y. 9, 141.

¹ Section 27 of the Act of April 23d, 1877.

While the foregoing are undoubtedly the popular and general meanings of solvency and insolvency, the courts in administering the bankruptcy and insolvency laws and laws regulating assignments for the benefit of creditors, have given the words limited and restricted meanings. Under those acts insolvency means inability to pay one's debts in the ordinary course of business.⁷ Also under insolvent acts where it was necessary to protect the creditors and compel an equal distribution of the insolvent's estate.⁸ The main purpose of the bankrupt act was to compel a debtor to distribute his property equitably among all his creditors. Hence, the following definition in the case of *Buchanan v. Smith*, *supra*: "Insolvency in the sense of the bankrupt act means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor in a case like the present, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they may mature in the ordinary course of business." By the terms of the act the creditor could not procure a preference if he knew of the failure of his debtor to meet obligations when due. The rule was applied particularly to traders, merchants and bankers. And this limited meaning of "insolvency" was first applied under the bankrupt act and for the above reason and no other. By what line of reasoning, then, can the restricted meaning be applied to the word when used in the penal statutes under discussion? Clearly no purpose is intended to be served by these statutes kindred to the purpose of the bankrupt acts. The objects of the two are entirely dissimilar. The penal statutes are supposed to prevent fraudulent banking. They are not intended to force all banks to keep all deposits in the

vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent. of their deposits. Does the legislature permit banks to loan 80 to 90 per cent. of deposits and at the same time fix a heavy penalty for not always having the same money on hand to pay out on demand? Yet this is the logical conclusion from the rule adopted in *State v. Cadwell*. As to rules of interpretation of statutes: "The language of our statutes is, in the greater part, not technical, in either sense above explained, but popular; to be understood, therefore, in its common popular meanings."⁹ "Ordinarily the language is to be understood in its common signification; as, for instance, general terms are to receive their general, not restricted, sense."¹⁰ If the legislature intended to compel banks to meet all demands of depositors without delay, instead of saving the latter from ultimate loss, then it has attempted an impossibility and the courts will be forced to hold the statute void as subversive of fundamental principles of right and justice. "While it would not be a legislative function to change the orbit of the earth and statutes attempting it would be void, it is otherwise where the legislative endeavor is to subvert the fundamental principles of right and justice. In point of abstract theory the two cases are identical and acts of the latter sort, that is, subversive of fundamental right and justice are equally void with the former. Able judges have in all ages so held."¹¹ But the statute should be sustained and will be if a reasonable construction can be applied. "The court will presume the legislature intended its acts to be reasonable, constitutional and just; and when possible, consistently with fair rendering of the words, will so construe them as not to make them otherwise."¹² The application of these principles and rules would require the courts to construe the penal statute under consideration so as to permit banks to do business if they are in condition to save depositors from ultimate loss; that is, if their property is worth more than all their liabilities, even though their

⁷ *Buchanan v. Smith*, 83 U. S. 277; *Wager v. Hall*, 16 Wall. 599; *Dutcher v. Wright*, 94 U. S. 557; *Bank v. Cook*, 95 U. S. 342; *Toof v. Martin*, *supra*; *Rev. St. U. S. Sec. 5128*.

⁸ *Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; *Vennard v. McConnell*, 11 Allen, 561; *Barnard v. Crosby*, 6 Allen, 327; *Van Riper v. Poppenhauser*, 43 N. Y. 68; *Dutcher v. Imp. & Traders' Nat. Bank*, 59 N. Y. 5.

⁹ *Bish. on Stat. Crimes*, Sec. 101, and many cases cited.

¹⁰ *Id.*, Sec. 102.

¹¹ *Id.*, Sec. 40, and cases cited.

¹² *Id.*, Sec. 90, and many cases cited.

condition be such at the time of receiving a deposit that maturing obligations soon after force them to suspend. But there is another objection to the decision in the case of *State v. Cadwell*. Upon the facts in the case it was unnecessary for the court to define insolvency as inability to pay one's debts on demand in the usual course of business. The uncontradicted testimony showed that the banks in question in that case had been insolvent in the popular sense for about five years prior to the receipt of the deposit complained of. That is, it was clear from the testimony that for about five years the liabilities of the banks had exceeded the value of the assets, thus showing that depositors, relying upon the assets of the bank, must ultimately suffer loss in the winding up of the affairs of the banks. Clearly this was a case of fraudulent banking and wholly unlike a case where a bank is forced to suspend and perhaps pass into the hands of a receiver from stress of hard times, rendering loans slow of collection, or an unexpected and unusual withdrawal of deposits, if all the time the bank is possessed of assets exceeding in value the amount of its liabilities. It is only in the latter case that the definition of insolvency given by the court in the Iowa case can apply. It fits only a case of that kind wherein the bank, although possessing a surplus of assets, is still unable for some cause to pay all deposits on demand, but where eventually, upon a winding up, the bank does in fact pay all debts in full. Yet, adopting the definition given by the court and following its reasoning to the logical conclusion, and even in the latter case the bank officers would incur the penalty fixed by the statute if they should receive deposits into their bank, even for months prior to actually closing it, if it ultimately turned out that the bank was then unable to meet all obligations on demand; that is, if a subsequent closing proved that the bank was unable to pay, on demand, obligations outstanding at the time of receiving the deposit complained of. The result of this application of the definition of insolvency would be to punish bank officers for receiving deposits when no one was injured; unless it be said that the depositor suffers injury when he is delayed, merely, in receiving back the money deposited by him in a bank. He might suffer no loss except that occasioned by delay and yet the bank of-

ficer be punished for receiving his deposit. This brings us back to the question: Was the statute enacted to prevent ultimate loss of the deposit, or only to prevent delay in the payment of deposits? The former purpose is reasonable; the latter is not. In any case the rule laid down by the court in the Iowa case was mere *obiter dictum* and unnecessary for the proper determination of the main question in the case. And thereby is the authority of the decision as a precedent greatly impaired.

WILLIS L. HAND.

EVIDENCE—DECLARATIONS BY ATTORNEYS.

LOOMIS v. NEW YORK, N. H. & H. R. Co.

Supreme Judicial Court of Massachusetts, May 16, 1893.

Where an attorney is retained, not only to sue a railroad company for damages caused by an accident, but also to present the plaintiff's claim to the company, and obtain settlement of it without suit, if possible, a letter written by his clerk, under his directions, to an officer of the company, stating what purported to be the facts in the case, in response to an inquiry by the company, is admissible in evidence for the company as a declaration by the plaintiff as to the facts. Field, C. J., and Lathrop, J., dissenting.

KNOWLTON, J.: The principal question in the case relates to the admissibility of a letter written to the defendant by a clerk of the plaintiff's attorney, under authority from the attorney, purporting to state the facts on which her claim was founded. The bill of exceptions sets forth two letters written to the attorney by the executive secretary of the defendant, and one afterwards written to the defendant by the attorney with his own hand. The first two, written by the clerk under authority from the attorney, were first offered, then testimony was introduced, and the defendant offered the letters from the attorneys to the defendant, "and also the letters of the defendant to Mr. Carroll," the attorney, and exceptions were taken to the refusal to admit them. It is clear that the defendant was not entitled to introduce the entire correspondence, for it contains statements of the executive secretary favorable to the defendant which were not competent. Perhaps, also, the last letter of the plaintiff's attorney, which he wrote with his own hand, was inadmissible, as containing opinions and comments which were strictly personal, and outside of the scope of his employment. It is contended that the only question open to the defendant is whether the entire correspondence was competent, but we are of opinion that the question whether the first two letters were competent was intended to be saved by the bill of exceptions.

The object of the evidence was to show that, when the plaintiff presented her claim through her attorney, it was for a fall at a place near where the defendant's evidence at the trial tended to show that it occurred, and where the stairs were in perfect condition, and not at the place where the plaintiff located it in her testimony. Upon the issue raised, the fact sought to be proved was material and important. We are also of opinion that the method of proof was competent and proper. The undisputed evidence tends to show that the attorney had been employed to represent her in the collection of a claim against the defendant for damages resulting from a fall in the defendant's railway station, at Hartford. The terms of his employment do not expressly appear. But a fair inference from the evidence is that he was not merely employed to bring a suit, but was authorized to present the plaintiff's claim, and to endeavor to obtain a settlement of it without a suit. If this was his authority, we have no occasion to consider the cases holding that admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. Such admissions are not within the scope of his employment. Nor have we any reason to consider in this case the general authority of an attorney, by virtue of his position as an attorney at law in charge of a suit, to bind his client by agreements in reference to the management or disposition of the suit. See *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Saunders v. McCarthy*, 8 Allen, 42; *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79. The maxim, "*qui facit per alium facit per se*," applies as well to acts done or statements made by an attorney at law as by any other agent. The act of a party, done by his agent, may always be proved against him, if material. An attorney or agent employed to present and collect a claim is impliedly authorized to state to the debtor what the claim is. The plaintiff could not have expected that her attorney would collect her claim from the defendant, on demand, without stating the nature and particulars of it, so that the defendant could understand it, and make investigation in regard to its validity. It was as much a part of his duty to state, as nearly as possible, the precise place in the building where the accident happened, if asked to, as to state in what town or state the plaintiff was when she fell. The defendant's letter of January 7, 1891, inquiring for particulars is competent, in connection with the letter of January 10th, which purports to be an answer to it, to show how the statement came to be made; and the two together, in connection with the first letter of January 5th, show conclusively that writing the words, "she fell on the third or fourth step from the bottom of the stairway across the tracks from the waiting room," was strictly within the authority of her attorney employed to present and collect her claim. The fact that they were not written by her own hand, but by an agent who was acting under instruc-

tions received through her husband who was also her agent in the same business, affects the weight, but not the competency of the evidence. 1 Greenl. Ev. § 186; *Marshall v. Cliff*, 4 Camp. 133; *Baring v. Clark*, 19 Pick. 220; *Woods v. Clark*, 24 Pick. 35, 39; *Cooley v. Norton*, 4 Cush. 93; *Haney v. Donnelly*, 12 Gray, 361; *Morse v. Railroad Co.*, 6 Gray, 450; *Gott v. Dinsmore*, 111 Mass. 45; *McAvoy v. Wright*, 137 Mass. 207. There is nothing in the adjudication in *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79, nor in the language of the opinion as applied to the matters then under consideration, which is at variance with the views above stated. The letters are not inadmissible as part of an offer to compromise a controverted claim. At the time they were written, there had been no intimation on the part of the defendant that the plaintiff would not be paid all that she thought it right to ask. The only communication which had been received from the defendant indicated a desire to ascertain the truth, as if for the purpose of promptly paying the claim if it appeared to be valid. Exceptions sustained.

NOTE.—As a general proposition the attorney has authority to make admissions and representations of fact either in court or out of it. 1 *Lawson's Rights Rem. & Pr.*, 280; *Pike v. Emerson*, 5 N. H. 393, 22 Amer. Dec. 468; *Talbot v. McGee*, 4 T. B. Mon. 377; *Farmer's Bank v. Sprigg*, 11 Md. 389; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Starke v. Keenan*, 11 Ala. 819; *Winans v. Lindsey*, 1 How. (Miss) 577; *Gilkerson v. Snyder*, 8 Watts & S. 200; *Rogers v. Greenwood*, 14 Minn. 333; *Harvey v. Thorpe*, 28 Ala. 250, 65 Amer. Dec. 344; *Rosenbaum v. State*, 33 Ala. 362; *Central Branch R. R. Co. v. Sharp*, 28 Kan. 394, 42 Amer. Rep. 163; *Wilson v. Spring*, 64 Ill. 14; *Lewis v. Sumner*, 13 Met. 272. But statements made by an attorney on other occasions are not admissions merely because they would be admissions if made by the client himself. 7 Amer. & Eng. Encyclopedia of Law 67. The admissions of an attorney to bind his client must be distinct and formal and made for the express purpose of dispensing with formal proof of a fact at the trial. *Treadway v. Sioux City*, etc. R. R. Co., 40 Iowa, 526. But if made long after a case has been tried and his employment is ended they are not binding. *Walden v. Bolton*, 55 Mo. 405. Where counsel for the plaintiff admitted that he could not recover on a count and the question was one of law it was held that as counsel could not make the law, his admission would not be binding on his client. *Mitchell v. Cotton*, 3 Fla. 136. Hasty inconsiderate admissions made by the attorney in the course of a trial do not bind the client though he was present and did not dissent. *Davidson v. Gifford*, 100 N. C. 18.

The decision in the principal case may be said to be at least on the borderland of doubt. *Field, C. J.*, and *Lathrop, J.*, dissent in a vigorous opinion which leaves the reader in a somewhat of a quandary as to the correct conclusion. It will be observed, as the dissenting judges assert that there was no evidence that the letters in question were written by the direct authority of the plaintiff or by her consent or even with her knowledge. There was no evidence that at the time of the accident Mr. Carroll was the plaintiff's attorney; and he could have had no personal knowledge on the subject, as it appeared that he was retained as an attorney at law, after the accident, by the

plaintiff's husband, and did not see her until less than two weeks before the first trial of the action, which was long after the letters were written. In *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79, the question was as to the effect of an admission made by Mr. Thayer, an attorney, after an action brought, but before the beginning of the case then before the court, was considered. One of the grounds of the decision was thus stated: "The admission was not made by Mr. Thayer for the purpose of dispensing with any rule of practice, or with the proof of any fact in the trial of the action already brought, or of the actions which might be brought, in reference to the attached property. It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other, if the attachment was not discharged." In support of these propositions several cases are cited, and an examination of them shows that the doctrine hitherto established is that an admission by an attorney at law does not bind his client, although it relates to a fact in controversy, unless it is made for the purpose of dispensing with some rule of practice, or with the proof of a fact in the trial of a case, or is an admission intended to influence the procedure in the action. To the same effect are the following cases: *Rockwell v. Taylor*, 41 Conn. 55; *McKeen v. Gammon*, 33 Me. 187; *Cassels v. Ustry*, 51 Ga. 621. The dissenting judges conclude as follows: "The opinion of the majority of the court apparently proceeds upon the theory that an attorney stands in a different relation to his client before action is brought from that which he occupies afterwards. But no case is cited which sustains this position. The general rule that an attorney cannot, without the consent of his client, disclose a confidential communication made to him by his client applies as well to communications made before action brought as afterwards. See *Foster v. Hall*, 12 Pick. 89, and cases cited. With one exception, the cases cited in the opinion of the majority of the court in support of the propositions that an attorney is merely an agent, and that his admission binds his principal, are cases of mere agents, and not of attorneys. They seem to me to throw no light on the question in this case. The case of *Marshall v. Cliff*, 4 Camp. 133, remains to be considered. This was an action against the owners of a vessel. To prove the defendants to be owners, there was offered in evidence an undertaking in the following form, given before the action was begun, by the persons who were afterwards the defendant's attorneys of record: 'I hereby undertake to appear for Messrs. Thompson and Marshall, joint owners of the sloop *Arundell*, to any action you may think fit to bring against them.' This was held by Lord Ellenborough to be sufficient evidence. But, as pointed out by Mr. Justice Parke in *Wagstaff v. Wilson*, 4 Barn. & Adol. 339, the undertaking was 'a step in the cause.'"

CORRESPONDENCE.

JEOPARDY—MISTRIAL—DISCHARGE OF JURY.

To the Editor of *The Central Law Journal*:

In your issue of August 4, you make editorial reference to the case of *Stocks v. State*, recently decided by the Supreme Court of Georgia, in which it was ruled by a divided court that the death of a juror's mother, followed by information of it imparted to him, con-

stituted such necessity as justified the trial court in discharging the jury after the trial had begun, and again putting the prisoner to trial before another jury. It is stated that "all the research of counsel on both sides, it appears, failed to produce any case like this on its facts." There is, however, another case just like it, in which the holding was the same as that of the Georgia court. The case referred to is *State v. Davis*, 31 W. Va. 390, 7 S. E. Rep. 24, the second head-note of which (taken from the *Southeastern Reporter*) is as follows: "Where after the greater part of the evidence had been heard in a felony case, the information was imparted to one of the jurors that his son had just died, and the court certified that it 'appeared to the satisfaction of the court that the juror by reason of his affliction was unable to discharge his duties as a juror' and discharged the juror at his request, it was held that a necessity for the discharge of the juror existed and he was properly discharged." This West Virginia case is cited in the opinion in the case of *Hawes v. State*, 88 Ala. 37, in which it was decided that the sickness of a juror's wife justified his discharge on the ground of necessity. To the same effect is *Com. v. Fells*, 9 Leigh (Va.), 613. In his very able and exhaustive opinion in the *Hawes* case, Mr. Justice McClellan discusses the rule of "necessity," gives the reason of it and collects the authorities. I quote one paragraph of it as giving a reference to the decisions in compact form: "The facts presenting such necessity, recognized by all courts as authorizing the discharge of the jury or the sickness of the juror (*Nugent v. State*, 4 S. & P. Ala. 72), or a juror (*Fletcher v. State*, 9 Humph. 249; *Rex v. Edwards*, 4 Taunt. 309; *Hector v. State*, 2 Mo. 166), or of the prisoner (*Brown v. State*, 38 Tex. 482; *State v. Wiseman*, 68 N. C. 203; *Lee v. State*, 26 Ark. 260), or the escape of a juror from his fellows (*State v. Hall*, 4 Halst. 266; *Reg. v. Ward*, 10 Cox C. C. 573), or the escape of the prisoner (*Battle v. State*, 7 Ala. 259); and, it would seem, the sudden illness of the solicitor, unless he have assistants or associates who can proceed with the case (*United States v. Watson*, 3 Benedict, 1)." To these may be added the following: Sickness of a juror's wife (*Com. v. Fells*, 9 Leigh, 613; *Hawes v. State*, 88 Ala. 37), and death of a juror's son (*State v. Davis*, 31 W. Va. 390), or of his mother (*Stocks v. State*, Sup. Court of Georgia, July 1893). From these authorities the principle is easily deducible that the happening of any "sudden, unforeseen, irremovable" event, which "incapacitates a juror, or the juror or prisoner, or under some circumstances the prosecuting officer, from properly and efficiently discharging their duties, or attending to the trial," constitutes the necessity which not only justifies, but makes it the duty of the court, charged with the office of seeing that both State and prisoner have a fair and impartial trial, to discharge the jury or incapacitated juror as the circumstances to the case may require. Every juror should at all times be capable of "that calm and deliberate consideration and reasoning which is of the essence of the office of a juror, and for the absence of which, in any member of the panel, the jury should be discharged." It is not material to inquire whether the public duty of the juror be or be not superior to his duty to the living or his desire to pay reverence to the memory of the dead. If he were, under the distressing circumstances existing in the *Stocks* case, compelled by the court to continue in service, this would undoubtedly constitute a good defense in morals for his absence from the funeral of his mother and he would be as one "in chains," but

it can hardly be contended that the restraint of the juror, *vi et armis*, or the putting him in chains, would tend toward procuring that "true deliverance" which the juror is sworn to make. To withhold from a juror the information of the death of a member of his immediate family or of a parent, would be the very refinement of cruelty which could only be exceeded by continuing him on the panel after his bereavement had been known to him. To continue a trial under such circumstances would be harrowing in the extreme to the feelings of every person present or participating in the proceeding. It is gratifying that the courts have found in the well settled law of "necessity" an escape from such a shocking spectacle. Other cases may and doubtless will arise, calling for the application of the general principle to a new state of facts, since the rule is not iron-bound but sufficiently elastic to allow its use in any case, coming within its reason.

S. D. WEAKLEY.

Birmingham, Ala.

BOOK REVIEWS.

AMERICAN STATE REPORTS Vol. 30.

In this volume will be found many important cases and a large number of valuable annotations. Those deserving of special mention are *Goddard v. Inhabitants of Harpswell (Me.)*, which has a forty page note on the subject of the liability of cities for the negligence and other misconduct of their officers and agents; *McNally v. Colwell (Mich.)*, on the liability of private persons for fires causing damage to others; *Van Etten v. Newton (N. Y.)*, on conclusiveness of bills of lading and demurrage for detention of freight by carriers; *O'Brien v. Philadelphia (Penn.)*, on the liability of cities for change of street grade.

AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW.

This, the latest volume of this valuable series, contains well written papers on Rescissions and Res Gestæ, an exhaustive review of the subject of Res Judicata, which takes nearly two hundred pages, papers on Revocation and Rewards, a two hundred and fifty page paper on Sales, which seems to be well prepared and thorough, and also papers on Salvage, Schools, Seire Facias, Seals, Seamen, Searches, and Seizures, Seduction and Sentence.

BOOKS RECEIVED.

THE INFRINGEMENT OF PATENTS FOR INVENTIONS, NOT DESIGNS, with sole reference to the opinions of the Supreme Court of the United States, by Thos. B. Hall of the Cleveland Bar. Cincinnati: Robert Clarke & Co., Publishers. 1893.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the Courts of Last Resort in the Several States. Selected, Reported and Annotated by A. C. Freeman and the Associate Editors of the "American Decisions," Vol. XXXI. San Francisco: Bancroft-Whitney Co., Law Publishers and Booksellers. 1893.

JETSAM AND FLOTSAM.

ELECTRICITY AS A NUISANCE. — Fire, water, poisons, filth, explosives have all been brought within the principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330, and now there must be added to the "wild beast" list, electricity (*National Telephone Co. v. Baker*, 93, 2 Ch. 186); and rightly, for is not this mysterious current of all dangerous and destructive forces known to science the strongest, swiftest, subtlest? Among other eccentricities it has the property, it seems, when discharged into the ground by a tram company, of paralyzing a neighboring telephone system and converting the messages into inarticulate murmurs, a fact which has already been discovered in America. This is certainly a grievance, for inaudibility is a distinct defect in a telephone: but it is no use having a grievance if the author of the nuisance is only doing without negligence as the tram company in this case. was what the Legislature has authorized him to do. In future, however, the Prospero of science and the Legislature too will have to study more closely the vagaries of this Ariel.—*London Law Quarterly Review*.

DEFENDING HOME PRODUCTIONS.—The *Albany Law Journal* says that a Missouri judge is said to have decided that a city ordinance imposing a fine on voters for failing to vote at municipal elections is constitutional and valid. "Here," continues our learned contemporary, "is an excellent opportunity for the *American Law Review* and the *CENTRAL LAW JOURNAL* to defend home productions. The decision strikes our judgment as sheer nonsense." And our excitable contemporary then proceeds to preach quite a sermon against the decision. Before we are called upon to defend such a "home production," we ought to make ourselves certain that it has been produced. It may have been the "home production" of a police justice. We have not seen the statement of the rendition of such a decision in any other publication, and our esteemed contemporary does not give its authority for stating that such a decision "is said" to have been rendered. That is to say, he does not say who said it, nor does he give the name of the judge who, he says, is said to have made it. There are, no doubt, judges foolish enough, in Missouri, to render such a decision, and there are just as foolish ones in New York. If the *Albany Law Journal* wants to defend home production, we can give him all the work he wants to do. The contract of defending the home production of the political judges of New York would be a very extensive contract.—*American Law Review*.

HUMORS OF THE LAW.

"Well," said the lawyer to the rural justice, "you sent for me?" "Yes," said the justice. "I want advice about this here prisoner. He's been ketched stealin' hogs, an', as I hain't got no law book, I don't know ef I'm entitled to lynch him or not."

In a case before a Missouri Circuit Court lately, there were two issues, one of equity and one of law, which the court was inclined to hear at different times and in the order named. Not so the learned attorney, who contended that the law issue must be first submitted because it is one of Brom's oldest maxims that "equity always follows the law!"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCOUNTING—When Allowed.—An action for an accounting will lie, where several parties are interested in a fund held by a trustee, where the facts are complicated, and where fraud is alleged in the procurement of a draft, the surrender of which is asked.—*HOLMES V. MALCOLM McDONALD LUMBER CO., Mich.*, 55 N. W. Rep. 450.

2. ACTION FOR PERSONAL INJURIES—Death of Plaintiff.—An action for personal injuries caused by the driver of defendant's delivery wagon negligently and recklessly running over plaintiff is not an action for assault and battery, within the meaning of Gen. St. ch. 10, § 1, excepting that class of actions from those which survive the death of the person injured.—*PERKINS V. STEIN, Ky.*, 22 S. W. Rep. 649.

3. ADMINISTRATION—Claim against Decedent's Estate.—An allegation, in a claim filed against a decedent's estate, for "services in the care and aiding and supporting" decedent's sister and minor children, is broad enough to include aid and support by the contribution of money. Services rendered and money spent by a son in taking care of his mother and her minor children at the special request of his uncle, on his promise to pay therefor, constitute a valid claim against the uncle's estate, after his decease.—*GRIMM V. TAYLOR'S ESTATE, Mich.*, 55 N. W. Rep. 447.

4. ADMINISTRATION—Lien for Rent.—Code, § 2402, provides that, "If there be no heir or devisee present, and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate, and demand and receive the profits thereof." Held, that an administrator had power to enforce a lien for rent, where, four years before, there was no heir present, or competent to take possession of the land, and the administrator had had possession of and rented the land since that time, and there was nothing to show that he was not entitled to possession.—*DURLAM V. STEELE, Iowa*, 55 N. W. Rep. 510.

5. ADMINISTRATION—Rent of Land.—Code, § 2402, provides that an administrator may take the rents of land accruing after the death of the owner, "If there be no heir or devisee present and competent to take possession." Section 2403 provides that under the order of the court the administrator may apply the profits of the real estate to the payment of the taxes and claims

against the estate, in case the personal assets are insufficient: Held, where a mortgage on land was foreclosed after the death of the owner, that the administrator cannot maintain an action against the heirs for the rents and profits received by them during the time for redemption, though there are no other assets to pay debts.—*DEXTER V. HAYES, Iowa*, 55 N. W. Rep. 491.

6. ADVERSE POSSESSION—Possession of Owner after Foreclosure.—If lands are sold under a decree of foreclosure, the grantee of the mortgage being made a party to the foreclosure suit, the sale extinguishes the title of such grantee; and if he remains in possession after the sale his possession is that of a tenant by sufferance, in subordination to the title of the purchaser at the sale, and does not become adverse until the relation of tenant by sufferance is disavowed, and the purchaser has knowledge or notice of the disavowal.—*GRAYDON V. HURD, U. S. C. C. of App.*, 55 Fed. Rep. 724.

7. ASSAULT AND BATTERY.—Under Pen. Code, art. 456, providing that an assault and battery may be committed though the person actually injured was not the person intended to be injured, where defendant began a quarrel, and, in order to prevent the person he was quarreling with from picking up an axe heve, struck at him, and accidentally hit a bystander, he is guilty of an assault and battery upon the latter.—*POWELL V. STATE, Tex.*, 22 S. W. Rep. 677.

8. ATTACHMENT—Priorities.—Defendant, residing in J county, gave plaintiff two notes. One was payable in H county, where plaintiff resided. The other note did not state the place of payment. Plaintiff commenced an action on the notes, aided by attachment, in H county: Held, that under Code, § 2590, providing that, if defendant is a resident of the State, an action, aided by attachment, must be brought in the county of his residence, or that in which the contract was to be performed, and section 2589, providing that, if a suit be brought in the wrong county, "It may there be prosecuted to a determination, unless defendant, before answer, demand a change of place of trial," as to the action on the note not stating the place of payment, defendant not having objected to the jurisdiction, a subsequent attaching creditor had no right to do so, and plaintiff's attachment created the superior lien.—*PATNE V. DICUS, Iowa*, 55 N. W. Rep. 483.

9. ATTORNEY AND CLIENT—Authority of Attorney.—The mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee.—*WILLIAMS V. GRUNDYSEN, Minn.*, 55 N. W. Rep. 557.

10. BAIL BOND—Date.—Where a bail bond is not dated, the date of the acknowledgment by the surety is controlling as to the date of its execution, though it is two months subsequent to the date of the certificates thereon of the sheriff and clerk as to the sufficiency of the security.—*WILLIAMS V. STATE, Tex.*, 22 S. W. Rep. 686.

11. BANKS AND BANKING—Protesting Negotiable Paper.—When a bank receives commercial paper for collection there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper; and an allegation that the holder instructed the bank to do so only states what the law implies, and changes neither the issues nor the burden of proof.—*JAGGER V. NATIONAL GERMAN AMERICAN BANK, Minn.*, 55 N. W. Rep. 545.

12. CARRIERS—Passengers—Contract of Carriage.—The written extension of the time to return on a ticket indorsed before it had expired will be given effect unless it is established that the extension was subject to certain conditions or contingencies.—*RANDALL V. NEW ORLEANS & N. E. R. Co., La.*, 13 S. W. Rep. 166.

13. CARRIERS OF PASSENGERS—Contributory Negligence.—It is not contributory negligence *per se* for a passenger to jump from a train which had failed

stop at the station a sufficient length of time to enable her to alight therefrom, and which had traveled less than 100 feet when she jumped, but the question should be left to the determination of the jury.—*CARR V. EEL RIVER & E. R. CO.*, Cal., 33 Pac. Rep. 213.

14. **CARRIERS—Unsafe Approach to Depot.**—A railroad company is liable to one who, while approaching its depot for the purpose of taking a train, is injured on a trestle used as an approach to the depot, unless it exercised extraordinary care to keep such trestle in a safe condition.—*JOHNS V. CHARLOTTE, C. & A. R. CO.*, S. Car., 17 S. E. Rep. 698.

15. **CONTEMPT—Newspaper Publication.**—A newspaper article implying that the supreme court has been induced, by improper influence, to delay rendering a decision, will render the editor and manager of such paper liable to punishment for contempt.—*PEOPLE V. STAPLETON*, Colo., 33 Pac. Rep. 167.

16. **CONTRACT—Building Contract—Performance.**—Where a building contract provides that the work shall be done to the satisfaction of the architect, and that any dispute as to claim for extra work shall be referred to him, and that his decision shall be final, it is error, to an action by the builder on the contract, to refer to the jury such questions as to extra work and the performance of the contract, in the absence of evidence of fraud, or if the question of fraud is not submitted to the jury.—*GUTHAT V. GOW*, Mich., 55 N. W. Rep. 442.

17. **CONTRACT—Compromise—Release of Debtor.**—Where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.—*CLARK V. ABBOTT*, Minn., 55 N. W. Rep. 542.

18. **CONTRACT—Construction.**—A contract by the defendant, upon whom rested no other obligation than that expressed, "to at once proceed to procure, and use all reasonable efforts to procure," from a specified person, a release of her interest in certain land, construed as not an absolute undertaking to procure the release, but only to make reasonable effort to do so.—*ORME V. MACKUBIN*, Minn., 55 N. W. Rep. 560.

19. **CONTRACT—Consideration.**—Where a lessee before the expiration of a lease, has subjected himself to damages by failure to pay the rent, and the lessor waives the conditions of the lease, and agrees to a reduction of the rent if the lessee will continue to occupy the premises, and the lessee agrees to continue to occupy them at the reduced rent, the agreement to continue the occupancy is a sufficient consideration for the agreement to reduce the rent.—*DOHERTY V. DOE*, Colo., 33 Pac. Rep. 165.

20. **CONTRACT—Measure of Damages.**—In an action to recover for an alleged breach of a contract entered into by defendant on selling his business to plaintiff, under which he agreed not to carry on a similar business in the same town, evidence that plaintiff's business had fallen off greatly after defendant opened up another place, and that defendant's old customers returned to him, does not furnish sufficient data by which damages can be estimated, and on such evidence he would only be entitled to nominal damages.—*HOWARD V. TAYLOR*, Ala., 13 South. Rep. 121.

21. **CONTRACT OF SALE—Construction.**—A written contract for the sale of logs "boomed and delivered to tug" construed, in connection with the evidence, as meaning that the seller was to inclose the logs in a boom, so that a tug could fasten to them and tow them away.—*GASPER V. HEIMBACH*, Minn., 55 N. W. Rep. 559.

22. **CONTRACT—To Procure Insurance.**—If one party undertake to procure for another a policy of insurance against loss by fire upon the house of the latter for a sum named, and, through oversight of the undertaker, no policy is actually procured, and the house is con-

sumed within the time covered by the proposed policy, the undertaker will be liable for no more than the value of the house, though that be less than the amount which was to have been named in the policy.—*LEHNEIS V. EGG HARBOR COMMERCIAL BANK, N. J.*, 26 Atl. Rep. 797.

23. **CONTRACT—Rescission.**—One whose mind has become enfeebled by epileptic attacks, and who has been induced to exchange land for stock in an insolvent corporation by false representations by the owner of the stock, who was the general manager of the corporation, as to the profits made by it, is entitled to a rescission of the contract, though he had an opportunity to examine the books of the corporation before the trade.—*DE FREES V. CARR*, Utah, 33 Pac. Rep. 217.

24. **CONTRACT—Statutes of Another Sale.**—Where a chattel mortgage on property located in Utah is executed outside of the territory, and no evidence is given to prove the statutes in regard to chattel mortgages at the place of execution, it will be presumed that the laws there are identical with the laws of the territory on the subject.—*AMERICAN OAK LEATHER CO. V. STANDARD GIG SADDLE CO.*, Utah, 33 Pac. Rep. 246.

25. **CONTRACTS BETWEEN FIRMS HAVING COMMON PARTNER.**—The fact that two partnerships have a common member will not prevent an action at law from being maintained on notes executed by individual members of one firm to individual members of the other, were the common member neither joins in the execution of the notes nor has any interest therein.—*JUNGK V. REED*, Utah, 33 Pac. Rep. 236.

26. **CORPORATIONS—Meetings of Stockholders.**—Unless otherwise provided in the charter or by-laws of an incorporation, such of the stockholders as actually assemble at a properly convened meeting, whether one or more, and although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business. The distinction in that regard pointed out between a corporate act to be done by a select and definite body, as by a board of directors or trustees, and one to be performed by the constituent members of the corporation.—*MORRILL V. LITTLE FALLS MANUF'G CO.*, Minn., 55 N. W. Rep. 547.

27. **CORPORATIONS—Stock Subscriptions—Fraud.**—Where a subscription to stock of a corporation, and subsequent payment for the stock, are procured by fraudulent representations as to the purposes of the corporation and the amount of paid-up stock, the stockholder may recover back land and money with which he paid for the stock, notwithstanding the insolvency of the corporation; its creditors not being parties to an action for such relief.—*RAMSEY V. THOMPSON MANUF'G CO.*, Mo., 22 S. W. Rep. 719.

28. **COUNTIES—Defective Bridge—Negligence.**—Where a person, knowing the defective condition of a bridge which is open for public travel, undertakes to cross the same, and is injured by reason of the defect, the question of whether he was guilty of contributory negligence in going on the bridge should be submitted to the jury.—*WAUD V. POLK COUNTY*, Iowa, 55 N. W. Rep. 528.

29. **COUNTIES—Defective Bridges.**—A county is not liable for personal injuries occasioned by the negligence of county officers in the construction or repair of county bridges.—*BOARD OF COM'RS OF EL PASO COUNTY V. BISH*, Colo., 33 Pac. Rep. 184.

30. **COUNTIES—Negligent Construction.**—A county is not liable for negligently constructing or failing to keep open a ditch constructed under Code, § 1207, which is paid for, not out of the general fund, but by assessments upon the property of persons benefited.—*DASHNER V. MILLS COUNTY*, Iowa, 55 N. W. Rep. 468.

31. **CREDITORS' BILL—Collateral to Secure Advances.**—Defendants deposited a note with a commission merchant as collateral security for advances to be used in the purchase of tobacco to be consigned to him for sale, and advances were made pursuant to the agree-

ment. Thereafter, and while the agreement was in force, a creditors' bill was brought against defendants, and the commission merchant was served with process, in order to subject the notes as assets in his hands: Held, that as to advances made in good faith before the suit was brought, he was entitled to hold the note as collateral for their repayment, whether they were used for the purpose of tobacco or not.—*BROOKS-WATERFIELD CO. V. BROOKOVER*, U. S. C. C. (Ohio), 55 Fed. Rep. 699.

32. CRIMINAL EVIDENCE—Expert.—On a murder trial an expert cannot give his opinion, judging from the direction and bearing of the wound, as to the position of the parties when the wound was inflicted.—*CHAMP V. STATE*, Tex., 22 S. W. Rep. 678.

33. CRIMINAL LAW—Confession.—Evidence that a person other than defendant confessed that he himself committed the crime is admissible; it being heresy, and irrelevant.—*STATE V. WEST*, La., 13 South. Rep. 173.

34. CRIMINAL LAW — Defilement.—To constitute a crime under Code, § 3862, providing that any person who by force or duress defiles a woman shall be fined, etc., the woman defiled need not be of previous chaste character.—*STATE V. FERNALD*, Iowa, 55 N. W. Rep. 534.

35. CRIMINAL LAW—Forged Check.—On a trial under Rev. St. 1889, § 3634, for selling a forged check "with intent to have the same passed," there was evidence that defendant falsely represented himself as being another man, drew a check on the J bank, signing a fictitious name as drawer, and sold it to the W bank: Held, that the evidence showed guilty intent, and justified a conviction.—*STATE V. PATTERSON*, Mo., 22 S. W. Rep. 96.

36. CRIMINAL LAW — Homicide — Threats.—The overt act or hostile demonstration of the deceased against the accused must be proved before the introduction in evidence of communicated threats.—*STATE V. HARRIS*, La., 13 S. W. Rep. 199.

37. CRIMINAL LAW—Murder—Provocation.—On a murder trial it is not necessary to show, beyond a reasonable doubt, that defendant made the first assault, or commenced the difficulty, except where the question of who commenced the difficulty is a material inquiry.—*STATE V. WORKMAN*, S. Car., 17 S. E. Rep. 694.

38. CRIMINAL LAW — Newly-discovered Evidence.—Evidence of a witness that stolen goods had been sold by some one other than defendant, at a place where witness was employed, and in witness' presence, cannot be regarded as newly-discovered, for the purposes of a new trial, even if a new trial can be granted in criminal cases for newly-discovered evidence, where such witness had testified on the trial, and no diligence is shown in ascertaining what he knew about the matter.—*STATE V. DIMMITT*, Iowa, 55 N. W. Rep. 531.

39. CRIMINAL PRACTICE — Burglary—Turning State's Evidence.—On a trial for burglary, defendant pleaded an agreement with the county attorney, by which he was induced to turn State's evidence against his confederate at the examination; that the State was unable, without his evidence, to convict such confederate; that he was duly recognized to appear and testify before the court, and in all matters has been ready to carry out his agreement. The court sustained a demurrer thereto on the ground that such plea was unauthorized by law, and struck it out: Held, that such ruling was error.—*CAMRON V. STATE*, Tex., 22 S. W. Rep. 682.

40. CRIMINAL TRIAL — Jury. — Where on a criminal trial the prosecuting attorney improperly comments on defendant's failure to testify, and after a verdict against defendant he moves for a new trial, and fails to make the misconduct of the prosecuting attorney one of the grounds of such motion, the objection thereto will be regarded as waived.—*PEOPLE V. SAN-SOME*, Cal., 33 Pac. Rep. 202.

41. DEED — Delivery. — Where a grantor executes a deed in payment of a debt, and files the same for

record, without the knowledge of the grantee, and without any previous agreement between, them it constitutes no delivery, and if, before the grantee acquires knowledge of the deed, a judgment is rendered against the grantor, which is a lien on the land conveyed, a subsequent ratification and acceptance by the grantee will not relate back so as to cut off the judgment lien.—*CRAVENS V. ROSSITER*, Mo., 22 S. W. Rep. 736.

42. DEED—Description.—Plaintiff received a deed for property described as beginning on O street, 30 feet west of a certain alley, and running west on that street 52½ feet. He subsequently conveyed to defendant's predecessor in title a portion of said land, describing it as beginning 50 feet east of S street, and running east on O street 25 feet; "being the western 25 feet of property acquired by" plaintiff as above. The distance between the alley and S street was 135 feet: Held, that the call in the deed to defendant of 50 feet east of S street as the point of beginning was evidently false, and must be rejected, the remainder of the description being sufficient to identify the property.—*WEST V. BRETTEL*, Mo., 22 S. W. Rep. 705.

43. DEED—Validity—Capacity of Grantor.—A deed of land from one who at the time of its alleged execution was mentally incapable of executing the same is void.—*ELDER V. SCHUMACHER*, Colo., 33 Pac. Rep. 175.

44. DEED—Vested Remainder. — A deed of land contained the following clauses: "This land is deeded to V during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to J and his heirs, forever. This deed is not to take effect until the death of P [the grantor], and P is to have and keep full possession of said land during his life, to have all proceeds of said farm until his death." Held, that the grantor divested himself of all title to the land except his life estate, and that J took a vested remainder.—*PHILIPS V. THOMAS LUMBER CO.*, Ky., 22 S. W. Rep. 652.

45. EASEMENTS — Ways — Prescriptions. — A person who buys land accessible to a public road is not entitled to a way of necessity to another road across other lands of the grantor, although it may be a shorter distance, and the first road may be merely a dirt road, while the other is a rock road.—*VOSSEN V. DAUTEL*, Mo., 22 S. W. Rep. 734.

46. ELECTION—Jury Trial.—Since at common law, a party to proceedings to try title to a public office had no right to have such issue tried by jury, he is not within the protection of Const. art. 1, § 12, providing that the right to trial by jury shall remain inviolate; and Code, § 428, providing that a contest of an election for the office of judge of probate must be heard and decided by the "Judge" of the circuit court of the county where the election is held, is therefore not violative of the constitutional provision.—*TALIAFERRO V. LEE*, Ala., 13 South. Rep. 125.

47. EXECUTION SALE—Redemption.—Code, §§ 3102-3105, provide that the right to redeem from an execution sale shall be exclusively in the execution defendant for the first six months; then in his creditors having liens in common with defendant, and as between each other, for the next three months; and to defendant exclusively for the last three months. Section 3123 provides that defendant's rights to redeem are transferable, and the assignee has the like power to redeem: Held, that where an execution defendant conveyed his real estate by a deed absolute on its face, but which was in fact a mortgage, and the mortgagee quitclaimed to a third person, such person took no greater rights than the mortgagee had, and had the right to redeem as a creditor only.—*ROBERTSON V. MOLINE*, MILBURN & STODDARD WAGON CO., Iowa, 55 N. W. Rep. 495.

48. EXECUTION SALE—Title Acquired.—The R Co. sold goods to B, who allowed them to remain in possession of the company, and while in such possession they were sold to plaintiff under a judgment against B. Plaintiff permitted them to continue in the possession of the company until, under an attachment against it, they were seized by the sheriff: Held, that the sale to

R, not having been followed by an actual and continued change of possession of the property sold, was void under the statute of frauds, as against the creditors of the company, and that plaintiff purchased only the interest of R in the goods, and, having allowed them to continue in the possession of the company, could not claim them as against its creditors.—*RIZER v. MCCARTHY*, Colo., 33 Pac. Rep. 191.

49. **EXECUTORS—Unauthorized Sales.**—Where a sale of land was made by the executrix of a will, a clause whereof purported to vest in her the fee in such land as trustee for the heirs, and by an adjudication thereafter such clause is declared void, and the land decreed to vest in the heirs as if the ancestor had died intestate, though entitled to the lands, no action will lie in their behalf against the executrix or her successors for the proceeds of such unauthorized sale, since they would have no right to the money without recognizing the sale as valid, and since, if they did affirm such sale, the proceeds would be in the hands of the executrix or her successors, subject to the trust created by the will.—*TONNELE v. ZABRISKIE*, N. J., 26 Atl. Rep. 808.

50. **EXPERT EVIDENCE—Master and Servant.**—One who is well acquainted with the use of a mechanical appliance, and has had a large experience in using it, though not familiar with its construction, is competent to testify as to whether such appliance "was reasonably adapted for the purpose for which it was used," and also as to its condition at the time of the accident.—*ALABAMA CONNELLSVILLE COAL & IRON CO. v. PITTS*, Ala., 13 South. Rep. 135.

51. **FEDERAL COURTS—Receivers—Illegal Taxation.**—Property in the hands of a receiver of a federal court is bound for the payment of State taxes in the same manner as any other property, but when a receiver believes a tax to be invalid it is his right and duty to apply to the court appointing him for protection.—*EX PARTE CHAMBERLAIN*, U. S. C. C. (S. Car.), 55 Fed. Rep. 704.

52. **FIXTURES—Mortgages.**—On the foreclosure of a mortgage of a leasehold it appeared that, when the mortgagor commenced the erection of the building thereon, he expected to obtain a conveyance of the premises, but only received a lease for 20 years, and then erected the building, as first planned. The lease required the lessee to maintain on the premises an hotel and eating house, to be operated in connection with the lessor's railroad station, and provided for a renewal of the lease on its termination, or a disposition of the building under certain circumstances, but in no event could the lessee remove the same without the lessor's consent: Held, that the building was not a mere fixture, but a part of the realty, so that the lien thereon of a mortgage on the leasehold, taken without notice, was superior to that of a prior chattel mortgage on the building day.—*FLETCHER v. KELLY*, Iowa, 55 N. W. Rep. 474.

53. **FRAUDULENT CONVEYANCES—Confidential Relations.**—Defendant, who was largely in debt, and whose creditors were pressing him, conveyed with great secrecy his entire stock of goods and the bulk of his land to B, his father-in-law, who knew that he was in failing circumstances. Pending the transfer he told his creditors that he would make no conveyance of his property. Though defendant owed B, it was clearly shown that he never expected to be called on for payment, and in furnishing statements of his financial condition as a basis of credit he made no mention of such indebtedness: Held, a fraud on creditors.—*YOUNGER v. MASSEY*, S. Car., 17 S. E. Rep. 711.

54. **FRAUDULENT CONVEYANCES—Husband and Wife—Insolvent.**—Where a husband receives from his wife money inherited by her, and uses the same in his business, there is an implied promise on his part to repay her, and, as between them a valid indebtedness from him to her is created. Where such husband, while in failing circumstances, in good faith, transfers property to his wife, in payment of a bona fide debt, or if, with fraud on his part, but without participation

therein by the wife, he makes such transfer, the transaction will be upheld.—*RILEY v. VAUGHN*, Mo., 22 S. W. Rep. 707.

55. **GIFT OF MONEY—Delivery.**—A deposited from time to time with B certain sums of money. A had no voucher for such deposits, but had in her possession a slip of paper containing a column of figures made by B, the sum total of which corresponded with the aggregate of such deposits. With the exception of a date there was no writing on the paper. A gave to C orally these moneys, and delivered to C the slip of paper in question: Held, such gift was invalid on the ground that the subject of it was not legally delivered.—*COOK v. LUM*, N. J., 26 Atl. Rep. 803.

56. **GUARANTY—Authority of Agent.**—T & Co., desiring to attach the property of their debtor J, in another State, telegraphed to a bank there: "Please provide bondsmen, T & Co. v. J. See N" (T & Co.'s attorney),—and afterwards, "We guaranty you against loss on bond of \$2,000, T & Co. v. J." T & Co.'s attorney having levied an attachment on the debtor's goods, M, president of the bank, at the request of the attorney, and relying on T & Co.'s guaranty, executed an indemnity bond required by the sheriff, the goods being claimed by a chattel mortgagee: Held, in an action on such guaranty by M, that it was no defense that defendants had not authorized their attorney to procure the execution of any other than the attachment bond.—*McKELVEY v. TUCKER*, U. S. C. C. (N. Y.), 55 Fed. Rep. 719.

57. **HIGHWAYS—Nonuser—Railroad Companies.**—How. St. § 1315, provides that all roads which have been laid out, and not recorded, and which have been used eight years or more, shall be deemed public highways, subject to be discontinued by certain proceedings for that purpose: Held, that where a road had been laid out by a township, and actually used for eight years, it became a public highway, and the mere nonuser for a period of two years, in the absence of any proceedings to discontinue it, did not entitle a railroad company crossing the road to exclude the public by fencing in its right of way.—*McNAMARA v. MINNEAPOLIS*, St. P. & S. STE. M. Ry. Co., Mich., 55 N. W. Rep. 440.

58. **HOMESTEAD—Abandonment.**—One who, with his family, removes from his farm, and lives continuously in a city for five years thereafter, where he votes and claims his residence, abandons the farm as a homestead, though he may have left some of his household effect there.—*HOFFMAN v. BUSHMAN*, Mich., 55 N. W. Rep. 458.

59. **HUSBAND AND WIFE—Fraudulent Conveyances.**—A wife let her husband have money received from her father's estate without promise to repay, or any note or other writing. The husband used the money as he saw fit, finally buying a piece of land, which he took in his own name. This land was retained by him until the insolvency of a firm in which he was interested, and then conveyed to the wife: Held, that the wife was not entitled thereto as against persons who had given the firm credit believing that the land was that of the husband, and who were unable to find other property of the firm or partners.—*PORTER v. GORLE*, Iowa, 55 N. W. Rep. 530.

60. **HUSBAND AND WIFE—Homestead.**—The husband cannot compel the sale, for partition and distribution, of the homestead owned jointly by himself and wife, though under the laws of the State, in relation to her right of property, the wife is emancipated from the disabilities of coverture.—*MITCHELL v. MITCHELL*, Ala., 13 South. Rep. 147.

61. **HUSBAND AND WIFE—Paraphernal Property—Sale by Husband.**—Where the husband, who administers the movable paraphernal property of the wife, sells it to one who purchases in good faith, the latter will be protected from the claims of the wife on said property. She must look to her husband for reimbursement.—*McGUIRK v. MARCHAND*, La., 13 South. Rep. 161.

62. **INDIANS—Crimes on Reservation.**—Unless other-

wise provided by treaty with an Indian tribe, or by the act admitting the State into the Union, the criminal laws of the State, except so far as restricted by the authority of congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians.—*STATE V. CAMPBELL*, Minn., 55 N. W. Rep. 553.

63. INJUNCTION—Against Erection of Fence.—An injunction will issue to restrain the erection of an unsightly fence, six to seven feet high, on the boundary between complainant's and defendant's lots, in the residence portion of a city, depreciating the value of complainant's property, and constructed maliciously, as the outcome of a quarrel between the parties.—*KIRKWOOD V. FINEGAN*, Mich., 55 N. W. Rep. 457.

64. INTOXICATING LIQUOR—Local Option Law—Information.—An information under the local option law, which alleges that defendant sold fermented cider, contrary to the provisions of the resolution adopted by the board of supervisors pursuant to such law, sufficiently alleges that the law has been made and is operative in the county.—*PEOPLE V. ADAMS*, Mich., 55 N. W. Rep. 461.

65. JUDGMENT—Appearance by Attorney—Presumption.—The authority of an attorney who has appeared in an action will be presumed, to the extent that relief against the judgment on the ground that he was not authorized will be granted only in case of direct application.—*CORBITT V. TIMMERMAN*, Mich., 55 N. W. Rep. 437.

66. JUDGMENT—Justice's Execution Sale.—Where execution is issued on a judgment in justice's court after an appeal has been taken therefrom to the superior court, a purchaser at constable's sale under such execution acquires no title to the property purchased.—*BULLARD V. MCCARDLE*, Cal., 33 Pac. Rep. 193.

67. JUDGMENT ON EXCESSIVE VERDICT.—Where a person in whose favor an excessive verdict was rendered files a remitter of the excess, the court, on appeal, will not reverse a judgment entered for the full amount of the verdict, unless it appears that the lower court, with knowledge of the remitter, has refused to reduce the judgment.—*J. P. KETCHAM & BRO. V. LARKIN*, Iowa, 55 N. W. Rep. 472.

68. JUDICIAL SALE—Mistake as to Title.—Where, on the settlements of a decedent's estate, one of the devisees purchases land under the belief that he is obtaining a fee-simple title thereto, and he completes the purchase by paying part cash, and giving a mortgage for the balance, the fact that, owing to the failure to make contingent remainder-men parties, he obtains merely a life estate, is not a ground for relieving him from the purchase, nor can he require that such remainder-men be made parties to the proceeding.—*SMITH V. WINN*, S. Car., 17 S. E. Rep. 717.

69. LIEN—Agistor's Mortgage.—An agistor's lien takes precedence of a chattel mortgage executed while the animals were in possession of the agistor, of which fact the mortgagee had notice when he took the mortgage.—*TABOR V. SALISBURY*, Colo., 33 Pac. Rep. 190.

70. MANDAMUS—Directing Judgment on Remand.—When the supreme court reverses a cause, and directs the lower court to enter a particular judgment, the writ of *mandamus* is a proper remedy to compel obedience to such mandate; but the reversal of a cause with directions for further proceedings in accordance with the opinion of the supreme court is not necessarily equivalent to a reversal with directions to enter a particular judgment.—*PEOPLE V. DOWNER*, Colo., 33 Pac. Rep. 160.

71. MECHANICS' LIENS—Ownership of Land.—A husband holding a lot by contract of purchase in his own name, who, with his wife's knowledge and consent, makes a written contract for the erection of a building on the lot, and conducts the business throughout in his own name and for himself, without disclosing any agency for the wife, must be deemed the owner of the lot as to mechanics and material-men furnishing labor

and material on the house, and the wife cannot, as against them, assert ownership to the lot.—*BARTLETT V. MAHLUM*, Iowa, 55 N. W. Rep. 514.

72. MECHANICS' LIENS—When Lien Attaches.—As respects the date of acquiring a lien, the term "furnish," as used in the mechanic's lien law, means furnished on the premises; and the liens of all mechanics and material-men attach as of the date of the performance of the first work, on the delivery of the first material on the ground; that is, from the commencement of the improvement on the land.—*WENTWORTH V. TUBBS*, Minn., 55 N. W. Rep. 543.

73. MORTGAGE—Usury—Bona Fide Purchasers.—Where property is sold on a usurious mortgage, one who purchases at the foreclosure sale, and pays his money, without any notice of the usurious character of the mortgage, is protected as a *bona fide* purchaser of the property; and the same is true where, after the foreclosure sale, and before the expiration of the time of redemption, a person buys the interest or estate of the mortgagee, who bid in the property at such sale.—*HOLMES V. STATE BANK OF DELUTH*, Minn., 55 N. W. Rep. 555.

74. MORTGAGES—Agreement of Vendee.—Where a grantee of land subject to an indebtedness secured by mortgage assumes and agrees to pay the indebtedness, such obligation is binding, not only as between him and his grantor, but also between him and the mortgagee, and his assigns.—*FISK V. STEVENS*, Utah, 33 Pac. Rep. 248.

75. MORTGAGES—Foreclosure.—A judgment for plaintiff in an action to foreclose a mortgage on land, where the mortgagor has parted with his interest in the land, and the only relief sought by plaintiff is the sale of the mortgaged premises, is valid against the grantees of the mortgagor, though the personal representative of the mortgagor is not a party to the action.—*GUTZEIT V. FENNIE*, Cal., 33 Pac. Rep. 199.

76. MORTGAGES—Validity.—A mortgage by a debtor to secure *pro rata* certain creditors is not fraudulent where there is no combination with the mortgagees, and the debtor before executing it, proposed to the objecting creditors to include them as mortgagees, and they declined the proposition.—*MONOGHAN BAY CO. V. DICKSON*, S. Car., 17 S. E. Rep. 696.

77. MUNICIPAL CORPORATIONS—City Attorney.—Where a city attorney is elected while an ordinance providing that it is his duty to act for the city in any suit brought by or against it, and generally to attend to its interests as its attorney, is in force, it is part of his duty to conduct the defense to a suit brought to quiet the title to a track of land therein, known as a "public square."—*RYCE V. CITY OF OSAGE*, Iowa, 55 N. W. Rep. 532.

78. MUNICIPAL CORPORATION—Defective Streets.—Whether a board with an upturned nail is attached to, and constitutes part of, a sidewalk, makes no difference as to the liability of the town with respect to injuries sustained by one crossing the street to the walk, and stepping on the nail, as the town is liable for any defect so near the traveled portion of the walk or street as to endanger persons thereon.—*PITTINGER V. TOWN OF HAMILTON*, Wis., 55 N. W. Rep. 423.

79. MUNICIPAL CORPORATIONS—Election.—The Australian ballot law applies to elections in towns of the fourth class to determine as to the issue of bonds representing municipal indebtedness; and a special election for that purpose, held, not in conformity to that law, but to one formerly in force, is invalid.—*STATE V. SEIBERT*, Mo., 22 S. W. Rep. 732.

80. MUNICIPAL CORPORATION—Ordinances.—A city ordinance which makes it unlawful for a railroad company "to make up any train across [a certain street] by switching or otherwise, at any time," construed to mean that the company shall not stop the cars on or across the street in the operation of making up a train, is valid as a reasonable exercise of municipal author-

ity.—*MAYOR V. ALABAMA G. S. R. Co., Ala., 13 South. Rep. 141.*

81. MUNICIPAL CORPORATIONS — Powers.—Under the general welfare clause to be found in all municipal charters, which is often implied from the other powers granted, the city or municipality cannot enlarge these powers further than necessary to carry into effect the specific power granted.—*STATE V. ROBERTSON, La., 13 South. Rep. 164.*

82. MUNICIPAL CORPORATION — Street — Certiorari.—Where an appeal is not taken within five days from a judgment confirming the jury's award in a street opening proceeding, as provided by How. St. § 3064o, certiorari will not lie six months thereafter to review such proceeding on the petition of a part, only, of the respondents therein, in the absence of a statute authorizing such writ in such case, since it must be presumed that the other respondents interested in such proceeding, and who might be prejudiced if the judgment were disturbed, have acquiesced in the result, and complied with all further requirements.—*CITY OF DETROIT V. MURPHY, Mich., 55 N. W. Rep. 441.*

83. MUNICIPAL ELECTIONS—Contest—Opening Boxes.—Rev. St. 1879, § 5528, and 1 Rev. St. 1889, § 4706, confer jurisdiction on the circuit courts "in cases of contested elections for county officers." Laws 1883, p. 91, bestows authority on any court before which any contested election may be pending to issue a writ to have the boxes opened. Act 1891 amended section 4706, by inserting therein the words "and municipal," so that it reads: "The circuit courts shall have jurisdiction in cases of contested elections for county and municipal offices." Held, that in a contest of an election for a municipal office the court may issue a writ to have the boxes opened.—*STATE V. KLEIN, Mo., 22 S. W. Rep. 693.*

84. NEGLIGENCE—Evidence.—In an action for injuries inflicted by defendant's servant in negligently causing or permitting a team of horses to run over plaintiff, evidence that such servant is a prudent and first-class driver, and that he had never been guilty of any carelessness during the four years he had been in defendant's employ, is inadmissible to show that he exercised ordinary care when the accident occurred, since that question must be determined on evidence of what took place at the time.—*TOWLE V. PACIFIC IMP. CO., Cal., 33 Pac. Rep. 207.*

85. NEGOTIABLE INSTRUMENT — Defenses. — Where defendant gave his notes to the agent of a foreign insurance company, individually, for the renewal of premium notes previously given, and the agent advanced his own money to the company for defendant, it is no defense, in an action on the notes, that the company had not complied with the provisions of law, so as to entitle it to do business in the State.—*RUSSELL V. JONES, Ala., 13 South. Rep. 145.*

86. NEGOTIABLE INSTRUMENT — Note — Indorser after Maturity.—An indorser of overdue notes is not liable thereon in the absence of demand on the maker within a reasonable time after the indorsement and notice of non-payment.—*BEER V. CLIFTON, Cal., 33 Pac. Rep. 204.*

87. PARTIES — Mandamus — School Districts.—Under Code, § 2545, which provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, an independent school district and a teacher employed by the board may join as plaintiffs in an action to compel the president of the board to approve and file the contract of employment, since both are interested in the subject of the action,—the contract,—and in the relief demanded,—its approval and filing.—*INDEPENDENT DIST. V. RHODES, Iowa, 55 N. W. Rep. 524.*

88. PARTNERSHIP — Purchase of Interest. — A person who buys the interest of one of the partners of a firm does not thereby become personally liable on a prior obligation of such firm, in the absence of proof that he in some way assumed such obligation. — *FIRST NAT. BANK V. SIMMONS, Cal., 33 Pac. Rep. 197.*

89. PASSENGERS — Damages—Mental Anguish.—In an

action by a passenger against a carrier for personal injuries, plaintiff's evidence tended to show that threats of personal violence by the conductor and others induced him to jump from the train: Held, that an instruction that plaintiff could recover damages for threats, whether any injury resulted therefrom or not, and that plaintiff could recover for mental anguish unattended by physical injury, was erroneous. — *SPOHN V. MISSOURI PAC. RY. CO., Mo., 22 S. W. Rep. 690.*

90. PRINCIPAL AND AGENT — Sales to Agents. — In an action against a principal to recover the value of goods sold to an agent for use in an hotel, the burden is on plaintiff to show that the goods sold are of such character as the nature of the business authorized the agent to purchase.—*WALLIS TOBACCO CO. V. JACKSON, Ala., 13 South. Rep. 120.*

91. PUBLIC LAND — Town-site Entries — Abutters. — Where public land is entered and platted under the town-site act, the purchasers of lots abutting on a platted street acquire the easements of access, light, and air; and they are entitled to have the street forever kept open, though the fee may be in the town as trustee for the public, instead of in the abutting owners for street uses.—*DOOLY BLOCK V. SALT LAKE RAPID TRANSIT CO., Utah, 33 Pac. Rep. 229.*

92. RAILROAD COMPANY — Street Railroads—Electric Cars. — Stringing a single wire along a street 20 feet above the surface is not an interference with the rights of the owners of lots fronting on such street.—*PATERSON RY. CO. V. GRUNDY, N. J., 26 Atl. Rep. 788.*

93. RAILROAD COMPANIES — Frightening Horses — Negligence. — A railroad company is not guilty of negligence in not erecting a screen or fence at its station between the driveway thereto and the tracks, so that horses standing at the station may not be frightened at approaching trains.—*FLAGG V. CHICAGO, D. & C. G. T. J. RY. CO., Mich., 35 N. W. Rep. 444.*

94. REAL ESTATE — Adjoining Owners — Lateral Support. — Civil Code, § 832, which provides that each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the adjoining owner to make excavations for construction on using ordinary care to sustain the land of the other, and giving previous reasonable notice of his intention, is merely declaratory of the common law; and, while a coterminous owner has the right to the support of his soil in its natural state by that of his neighbor, such right does not extend to the support of any additional weight or structure he may place thereon.—*SULLIVAN V. ZEINER, Cal., 33 Pac. Rep. 209.*

95. REAL ESTATE BROKER—Commissions.—Where the owner merely states to a broker, not employed as his agent, the net price which he will accept within a limited time, and the broker procures an offer of such price within such time, but does not procure the execution of a binding contract, nor a purchaser ready to pay the purchase price within the time limited, and the owner refuses to allow further time, the broker cannot recover commissions.—*CASTNER V. RICHARDSON, Colo., 33 Pac. Rep. 163.*

96. RECORD — Unrecorded Lease.—The possessor of real estate under an unrecorded lease is thereunder invested with no right whatsoever as against a seizing attachment creditor. — *FLOWER V. PEARCE, La., 13 South. Rep. 150.*

97. RES JUDICATA. — A question will be deemed adjudicated on the former appeal of a case only when the same must have been presented as necessary to a decision, and directly considered and decided.—*GWIN V. WAGGONER, Mo., 22 S. W. Rep. 710.*

98. RES JUDICATA—Estoppel.—The estoppel arising from a finding in a previous suit between the same parties is not confined to matters purely of fact, or of mixed fact and law, but extends to a decision of the legal rights of the parties on a state of facts common

to both suits, although the causes of action are different.—*SOUTHERN MINNESOTA RAILWAY EXTENSION CO. v. ST. PAUL & S. C. R. CO.*, U. S. C. C. of App., 55 Fed. Rep. 690.

99. **SALE OF MACHINE—Warranty.**—A contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc.: Held, that the warranty was not all embraced in the provision that it was "well made, of good material, and durable with proper care," but the contract warranted the machine to "work well."—*McCORMICK HARVESTING MACH. CO. v. BROWER*, Iowa, 55 N. W. Rep. 537.

100. **SPECIFIC PERFORMANCE—Indefinite Contract.**—An agreement, by an applicant for a patent, to assign a one-half interest in the patent, and of all improvements and extensions, in consideration of the assignee's promise to furnish "all moneys necessary to procure the patent, and to put the same into practical operation," is too vague and uncertain to be specifically enforced; the amount to be paid not being fixed, and the question whether a plant is to be established, and the management and capacity thereof, being undetermined.—*WEAVER v. SHENK*, Penn., 26 Atl. Rep. 811.

101. **SPECIFIC PERFORMANCE—Personal Services—Mutuality.**—A verbal contract, whereby plaintiff agrees to live with, and take care of, an old woman, until her death, in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the life-time of the woman; and after her death, equity will specifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard.—*BRINTON v. VAN COTT*, Utah, 33 Pac. Rep. 218.

102. **TAXATION—Boundary between States.**—A railroad bridge across the Mississippi river between Iowa and Illinois was constructed across a channel of the river to an island, and thence across another channel to the other shore. The island was permanent, and not a shifting sandbar. The channel on the west side of the island, between it and the Iowa shore, was the main channel, having greater depth of water, and being the one generally used for navigation: Held, that such channel was the boundary line between the States for the purposes of taxation.—*CHICAGO & N. W. RY. CO. v. CITY OF CLINTON*, Iowa, 55 N. W. Rep. 462.

103. **TAX SALE—Collateral Attack.**—The jurisdiction of the circuit in a proceeding by the State to obtain judgment against land for delinquent taxes for certain years cannot be impeached in a collateral action by showing that no assessments were made against the land for such years.—*GIBBS v. SOUTHERN*, Mo., 22 S. W. Rep. 713.

104. **TAX TITLES—Estoppel.**—Where persons purchase land from one holding tax deeds therefor, regular on their face, in good faith, and without notice of any illegalities in the tax sales, and go into possession, the former owner of the land, who has discontinued paying the taxes and has remained quiet for more than 20 years, is estopped to assert his title in equity against them, where no excuse is offered for the delay.—*HEWITT v. MORGAN*, Iowa, 55 N. W. Rep. 478.

105. **TELEGRAPH COMPANY.**—A telegraph company which has negligently delayed the transmission of a dispatch by substituting a wrong place of address cannot shield itself from liability because the message was not repeated, as required by the contract with the sender, since the repetition of a message is not a guard against delay.—*WESTERN UNION TEL. CO. v. LYMAN*, Tex., 22 S. W. Rep. 657.

106. **TELEGRAPH COMPANIES—Liability.**—A telegraph

blank contained the usual statement that to guard against mistakes or delays, the sender should cause the message to be repeated; that the company would not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; that it should not be liable therefor, in the case of any repeated message, beyond 50 times the sum received; and that it should not in any case be liable for delays arising from unavoidable interruption in the working of its lines: Held, that this stipulation did not protect the company against liability for damages which such repetition could have no tendency to prevent; and that, notwithstanding the stipulation, the company was liable for the failure of its operator to inform the sender of an important message that its line was down, or to send it by a competing line.—*FLEISCHNER v. PACIFIC POSTAL TELEGRAPH CABLE CO.*, U. S. C. C. (Oreg.), 55 Fed. Rep. 738.

107. **TRIAL BY JURY—Waiver.**—One accused in the municipal court of the city of Duluth of a criminal offense within the jurisdiction of justices of the peace may waive the right of trial by jury.—*STATE v. BANNOCK*, Minn., 55 N. W. Rep. 558.

108. **TRIAL BY JURY—Waiver.**—Where a party states in open court that it is immaterial to him whether the case is tried as a proceeding at law, or in equity, merely directing a trial as in equity is not a denial of a trial by jury, as it was his duty to demand such trial, if he wished it.—*LOTHIAN v. LOTHIAN*, Iowa, 55 N. W. Rep. 465.

109. **TRIAL—Failure to Call Witness.**—A general and indefinite objection to a question asked a witness should be overruled unless the question is plainly irrelevant. Where a person whose evidence would be competent for either party to an action was in court during the trial, and equally accessible to both parties, it is error to charge that the jury could draw an unfavorable inference against one of the parties for failing to call on such person as a witness.—*BATES v. MORRIS*, Ala., 13 South. Rep. 138.

110. **TRIAL—Witness—Refreshing Memory.**—It is not necessary that the memorandum used by a witness to refresh his memory should have been made by himself. He may use one made by any one, if, after inspecting it, he can testify of the facts, from his own recollection.—*CULVER v. SCOTT & WOLSTON LUMBER CO.*, Minn., 55 N. W. Rep. 582.

111. **TRUST—Declaration—Statute of Frauds.**—Where lands are held under an absolute deed of warranty, parol evidence cannot be introduced to establish an express trust in such lands.—*MCDONALD v. HOOKER*, Ark., 22 S. W. Rep. 655.

112. **WILLS—Estate Devised—Precatory Words.**—Testatrix devised her land to her husband, and on his death to her children, but if "he should get married after my death, in that event all of my said property, both real and personal, to revert" to the children: Held, that the provisions as to the disposition of the property after the husband's death or marriage were not mere precatory words, and that he took only a life estate on the land, subject to be defeated by his remarriage.—*STIVERS v. GARDNER*, Iowa, 55 N. W. Rep. 516.

113. **WILL—Rule in Shelley's Case.**—A devise to a daughter "for and during the term of her natural life, and at her death to the issue of her body who may then be living," vests in her, not a fee conditional, to become absolute on the birth of issue, but an estate for life, remainder to the issue of her body living at the time of her death.—*GADSDEN v. DESFORTES*, 8. Car., 17 S. E. Rep. 706.